SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1547

UNITED STATES OF AMERICA,

Petitioner,

vs.

FRANK DANIEL DIETER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MEMORANDUM IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

FEDERAL PUBLIC DEFENDER
P. O. Box 306
Albuquerque, New Mexico 87103

By David E. Booth
Attorney for Respondent

July 1976

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1547

UNITED STATES OF AMERICA,

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FRANK DANIEL DIETER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Frank Daniel Dieter, through his court-appointed attorney, pursuant to Rule 53 of the Revised Rules of the Supreme Court of the United States, moves this Honorable Court to grant him leave to proceed in forma pauperis in his response to this Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals.

Presented herewith is a certificate of indigence to be filed with the Memorandum in Opposition to Petition for a Writ of Certiorari.

FEDERAL PUBLIC DEFENDER
P. O. Box 306
Albuquerque, New Mexico 87103

By David E. Booth
Attorney for Respondent

SUPREME COURT OF THE UNITED STATES

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Respondent.

COUNSEL'S CERTIFICATE INDICATING PETITIONER'S INDIGENCE

Counsel, a member of the bar of this Court, states:

1. This present petition is a continuation of the cause, United States of America v. Frank Daniel Dieter, No. 25086 Criminal, in the United States District Court for the District of New Mexico.

2. In that case, Respondent was granted leave to proceed in forma pauperis on March 15, 1973.

3. No change in financial circumstances has occurred and as far as counsel can determine, the Respondent is without funds and assets to pay for the costs of this action.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
P. O. Box 306
Albuquerque, New Mexico 87103

By Daniel E. Bostic
Attorney for Respondent

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1547

UNITED STATES OF AMERICA,

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Respondent.

MEMORANDUM IN OPPOSITION TO
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REASONS FOR DENYING THE PETITION

1. The Decision of the Tenth Circuit Court of Appeals does not conflict with United States v. Healy, 376 U. S. 75 (1964).

The gist of the Government's argument in its Petition for a Writ of Certiorari is that the Tenth Circuit decision in this case (Government's Appendices A, B and C) conflicts with United States v. Healy, 376 U.S. 75 (1964). In its Petition the Government now views its Motion to Set Aside Order of Dismissal (Government's App. G) as a motion for rehearing instead of a motion made pursuant to Rule 60(b) of the Rules of Civil Procedure. If the Motion to Dismiss was actually a motion for rehearing then Healy is applicable. However, in the Motion to Dismiss the Government informed the District Court that the basis for the motion was the alleged "inadvertence" of the entry of the order of October 4, 1974 (Government's App. G). A motion based upon such alleged inadvertence

falls squarely within Rule 60(b) which provides in applicable part:

> Rule 60. Relief from Judgment or Order
>
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

Once having put the District Court on notice of the basis of its motion the Government should not now be allowed to claim the motion was of a different nature than it appeared. The motion speaks for itself. The motion notified the District Court that it was founded upon inadvertence. Judge Bratton denied the motion, not because the Government could not support a motion for rehearing on the law, but because he could find no clerical errors or inadvertence (Government's App. H, p. 11a).

A Rule 60(b) motion does not toll the perica for filing a notice of appeal since it will not affect the finality of the judgment. The Government seeks to diminish the force of this analysis by relying upon United States v. St. Laurent, 521 F.2d 506 (1 Cir., 1975). In St. Laurent a Government notice of appeal was determined to be timely since it was filed within thirty days of the denial of a timely motion for reconsideration of a suppression order. The issue in St. Laurent pertained directly to the merits of the case. In the instant case the issue before the

district court only concerned the alleged inadvertence in issuing the order of October 4, 1974. The motion involved herein was essentially an auxiliary claim and did not deal with the merits of the original order dismissing the indictment.

> 2. Even though a District Judge on his own motion may modify his judgment for error of fact or of law or may even revoke his judgment, this does not mean the Motion to Set Aside the Order of Dismissal tolled the period in which the Government has to file its Notice of Appeal.

The Government addresses this point at page nine, footnote two of its Petition and cites Zimmern v. United States, 298 U.S. 167 (1936) as authority that the district court may amend a motion to confer jurisdiction. The Motion to Set Aside the Order of Dismissal was denied for lack of authority or jurisdiction to grant the motion.

Zimmern stands for the proposition that the district judge has power to "modify his [own] judgment for error of fact or law or even revoke it altogether." Zimmern at 169-170.

Zimmern does not address the judicial authority to amend a motion in order to confer jurisdiction. Jurisdiction may not be conferred if it does not exist and the court, on its own motion, may decline to proceed if jurisdiction is lacking. Pacific National Insurance Co. v. Transport Insurance Co., 341 F.2d 514 (8 Cir., 1965). Judge Bratton lacked jurisdiction to decide the Government's Motion to Set Aside the Order of Dismissal. The filing of a motion for which the court has no jurisdiction does not toll the time for appeal. See, Hulson v. Atchison, T. & S.F. Ry. Co., 289 F.2d 726 (7 Cir., 1961), cert. denied 368 U.S. 835.

3. The Government raises the spectre that if the Tenth Circuit's decision stands litigants will be discouraged from seeking initial relief in district court.

The Government addresses this point at page twelve of its Petition. This spectre is a false fear since filing a motion under Rule 60(b) does not preclude the filing of a motion for rehearing in the district court.

CONCLUSION

It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
P. O. Box 306
Albuquerque, New Mexico 87103

By David E. Booth
Attorney for Respondent

I hereby certify that on this 12th day of July, 1976, a copy of the foregoing Memorandum in Opposition to Petition for a Writ of Certiorari was mailed to the Solicitor General, Department of Justice, Washington, D. C. 20530; and to the United States Attorney, P. O. Box 607, Albuquerque, New Mexico 87103. All parties required to be served have been served.

David E. Booth